

Introduced by Senator McPherson

February 20, 2004

An act to add and repeal Article 6.9 (commencing with Section 20209.20) of Chapter 1 of Part 3 of Division 2 of the Public Contract Code, relating to public contracts.

LEGISLATIVE COUNSEL'S DIGEST

SB 1793, as introduced, McPherson. Public contracts: design-build contracting: transportation authorities.

(1) Existing law sets forth the requirements for the solicitation and evaluation of bids and the awarding of contracts by public entities for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement. Existing law authorizes specified state agencies, cities, and counties to implement alternative procedures for the awarding of contracts on a design-build basis.

Existing law, until January 1, 2005, authorizes transit operators to enter into a design-build contract, as defined, according to specified procedures.

This bill would authorize, until January 1, 2010, certain transportation authorities to use a design-build process for bidding on transportation projects, including a requirement that certain information be verified under oath. Because a verification under oath is made under penalty of perjury, the bill would impose a state-mandated local program by changing the definition of a crime.

The bill would require these transportation authorities to report to the Legislature regarding implementation of the design-build process.

This bill would also make special findings and declarations for the necessity of a special law.

(2) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Article 6.9 (commencing with Section
2 20209.20) is added to Chapter 1 of Part 3 of Division 2 of the
3 Public Contract Code, to read:

4
5 Article 6.9. Transportation Authority Design-Build Contracts
6

7 20209.20. The Legislature finds and declares all of the
8 following:

9 (a) It is the intent of the Legislature, in enacting this article, to
10 provide an alternative and optional procedure for bidding on
11 transportation construction projects that is applicable only to any
12 transportation authority established in the County of Alameda
13 under Chapter 5 (commencing with Section 131240) of Division
14 12.5 of the Public Utilities Code or Chapter 2 (commencing with
15 Section 180050) of Division 19 of that code, and to the Santa Clara
16 Valley Transportation Authority established under Part 12
17 (commencing with Section 100000) of that code.

18 (b) (1) These transportation authorities should be able to
19 utilize cost-effective options for delivery of highway projects, in
20 accordance with the national trend, which includes authorizations
21 in California, to allow public entities to utilize design-build
22 contracts as a project delivery method.

23 (2) Utilizing a design-build contract requires a clear
24 understanding of the roles and responsibilities of each participant
25 in the design-build process. The benefits of a design-build contract
26 project delivery system include an accelerated completion of the
27 projects, cost containment, reduction of construction complexity,
28 and reduced exposure to risk for the transportation authority.



(3) The design-build approach should be used for the purposes of reducing project cost, expediting project completion, or providing design features not achievable through the design-bid-build method.

20209.22. For the purposes of this article, the following terms have the following meanings:

(a) “Best value” means a value determined by objective criteria, including, but not limited to, price, features, functions, life-cycle costs, and other criteria deemed appropriate by the transportation authority.

(b) “Design-build” means a procurement process in which both the design and construction of a project are procured from a single entity.

(c) “Design-build entity” means a partnership, corporation, or other legal entity that is able to provide appropriately licensed contracting, architectural, and engineering services as needed pursuant to a design-build contract.

(d) “Transportation authority” means any transportation authority established in the County of Alameda under Chapter 5 (commencing with Section 131240) of Division 12.5 of the Public Utilities Code or Chapter 2 (commencing with Section 180050) of Division 19 of that code, and the Santa Clara Valley Transportation Authority established under Part 12 (commencing with Section 100000) of that code.

20209.24. The transportation authority shall establish and enforce for design-build projects a labor compliance program containing the requirements outlined in Section 1771.5 of the Labor Code, or it shall contract with a third party to operate a labor compliance program containing the requirements outlined in that provision. This requirement does not apply to any project where the transportation authority or the design-build entity has entered into any collective bargaining agreement or agreements that bind all of the contractors performing work on the projects.

20209.26. Bidding for design-build projects shall progress as follows:

(a) (1) The transportation authority shall prepare a set of documents setting forth the scope of the project. The documents may include, but need not be limited to, the size, type and desired design character of the project, performance specifications covering the quality of materials, equipment, and workmanship,

1 preliminary plans, and any other information deemed necessary to
2 describe adequately the transportation authority's needs. The
3 performance specifications and any plans shall be prepared by a
4 design professional who is duly licensed and registered in
5 California.

6 (2) Any architect or engineer retained by the transportation
7 authority to assist in the development of the project-specific
8 documents may not be eligible to participate in the preparation of
9 a bid with any design-build entity for that project.

10 (b) Based on the documents prepared under subdivision (a), the
11 transportation authority shall prepare a request for proposals that
12 invites interested parties to submit competitive sealed proposals in
13 the manner prescribed by the transportation authority. The request
14 for proposals shall include, but need not be limited to, the
15 following elements:

16 (1) Identification of the basic scope and needs of the project or
17 contract, the expected cost range, the methodology that will be
18 used by the transportation authority to evaluate proposals, whether
19 the contract will be awarded to the lowest responsible bidder, and
20 any other information deemed necessary by the transportation
21 authority to inform interested parties of the contracting
22 opportunity.

23 (2) Significant factors that the transportation authority
24 reasonably expects to consider in evaluating proposals, including,
25 but not limited to, cost or price and all nonprice related factors.

26 (3) The relative importance of weight assigned to each of the
27 factors identified in the request for proposals.

28 (4) If a nonweighted system is used, the transportation
29 authority shall specifically disclose whether all evaluation factors
30 other than cost or price when combined are any of the following:

31 (A) Significantly more important than cost or price.

32 (B) Approximately equal in importance to cost or price.

33 (C) Significantly less important than cost or price.

34 (5) If the transportation authority reserves the right to hold
35 discussions or negotiations with responsive bidders, it shall so
36 specify in the request for proposal and shall publish separately or
37 incorporate into the request for proposal applicable rules and
38 procedures to be observed by the transportation authority to ensure
39 that any discussions or negotiations are conducted in good faith.

(c) (1) The transportation authority shall establish a procedure to prequalify design-build entities using a standard questionnaire prepared by the transportation authority. In preparing the questionnaire, the transportation authority shall consult with the construction industry, including, but not limited to, representatives of the building trades and surety industry. This questionnaire shall require information including, but not limited to, all of the following:

(A) If the design-build entity is a partnership, limited partnership, or other association, a listing of all of the partners, general partners, or association members known at the time of bid submission who will participate in the design-build contract.

(B) Evidence that the members of the design-build entity have completed, or demonstrated the experience, competency, capability, and capacity to complete projects of similar size, scope, or complexity, and that proposed key personnel have sufficient experience and training to competently manage and complete the design and construction of the project, as well as a financial statement that assures the transportation authority that the design-build entity has the capacity to complete the project.

(C) The licenses, registration, and credentials required to design and construct the project, including, but not limited to, information on the revocation or suspension of any license, credential, or registration.

(D) Evidence that establishes that the design-build entity has the capacity to obtain all required payment and performance bonding, liability insurance, and errors and omissions insurance.

(E) Information concerning workers' compensation experience history and worker safety program.

(F) A full disclosure regarding all of the following that are applicable:

(i) Any serious or willful violation of Part 1 (commencing with Section 6300) of Division 5 of the Labor Code or the federal Occupational Safety and Health Act of 1970 (Public Law 91-596), settled against any member of the design-build entity.

(ii) Any debarment, disqualification, or removal from a federal, state, or local government public works project.

(iii) Any instance where the design-build entity, or its owners, officers, or managing employees submitted a bid on a public works

1 project and were found to be nonresponsive, or were found by an
2 awarding body not to be a responsible bidder.

3 (iv) Any instance where the design-build entity, or its owners,
4 officers, or managing employees defaulted on a construction
5 contract.

6 (v) Any violations of the Contractors' State License Law
7 (Chapter 9 (commencing with Section 7000) of Division 3 of the
8 Business and Professions Code), excluding alleged violations of
9 federal or state law regarding the payment of wages, benefits,
10 apprenticeship requirements, or personal income tax withholding,
11 or of Federal Insurance Contribution Act (FICA) withholding
12 requirements settled against any member of the design-build
13 entity.

14 (vi) Any bankruptcy or receivership of any member of the
15 design-build entity, including, but not limited to, information
16 concerning any work completed by a surety.

17 (vii) Any settled adverse claims, disputes, or lawsuits between
18 the owner of a public works project and any member of the
19 design-build entity during the five years preceding submission of
20 a bid under this article, in which the claim, settlement, or judgment
21 exceeds fifty thousand dollars (\$50,000). Information shall also be
22 provided concerning any work completed by a surety during this
23 period.

24 (G) In the case of a partnership or any association that is not a
25 legal entity, a copy of the agreement creating the partnership or
26 association and specifying that all partners or association members
27 agree to be fully liable for the performance under the design-build
28 contract.

29 (2) The information required under this subdivision shall be
30 verified under oath by the entity and its members in the manner in
31 which civil pleadings in civil actions are verified. Information that
32 is not a public record under the California Public Records Act
33 (Chapter 3.5 (commencing with Section 6250) of Division 7 of
34 Title 1 of the Government Code) shall not be open to public
35 inspection.

36 (d) The transportation authority shall establish a procedure for
37 final selection of the design-build entity. Selection shall be based
38 on either of the following criteria:



1 (1) A competitive bidding process resulting in lump sum bids
2 by the prequalified design-build entities. Awards shall be made to
3 the lowest responsible bidder.

4 (2) A design-build competition based upon best value and other
5 criteria set forth in subdivision (b). The design-build competition
6 shall include the following elements:

7 (A) Competitive proposals shall be evaluated by using only the
8 criteria and selection procedures specifically identified in the
9 request for proposal. However, the following minimum factors
10 shall collectively represent at least 50 percent of the total weight
11 of consideration given to all criteria factors:

12 (i) Price.

13 (ii) Technical design and construction expertise.

14 (iii) Life cycle costs over 15 years or more.

15 (iv) Skilled labor force availability, determined by the
16 existence of an agreement with a registered apprenticeship
17 program, approved by the California Apprenticeship Council,
18 which has graduated apprentices in each of the preceding five
19 years. This graduation requirement shall not apply to programs
20 providing apprenticeship training for any craft that was first
21 deemed by the Department of Labor and the Department of
22 Industrial Relations to be an apprenticeable craft within the five
23 years prior to the effective date of this article.

24 (v) Acceptable safety record. A bidder's safety record shall be
25 deemed acceptable if its experience modification rate for the most
26 recent three-year period is an average of 1.00 or less, and its
27 average Total Recordable Injury/Illness rate and average lost work
28 rate for the most recent three-year period does not exceed the
29 applicable statistical standards for its business category or if the
30 bidder is a party to an alternative dispute resolution system as
31 provided for in Section 3201.5 of the Labor Code.

32 (B) When the evaluation is complete, the top three responsive
33 bidders shall be ranked sequentially from the most advantageous
34 to the least advantageous.

35 (C) The award of the contract shall be made to the responsible
36 bidder whose proposal is determined to be the most advantageous.

37 (D) Notwithstanding any other provision of this code, upon
38 issuance of a contract award, the transportation authority shall
39 publicly announce its award, identifying the contractor to whom
40 the award is made, along with a written decision supporting its

1 contract award and stating the basis of the award. The notice of
2 award shall also include the transportation authority's second and
3 third ranked design-build entities.

4 20209.28. (a) Any design-build entity that is selected to
5 design and build a project under this article shall possess or obtain
6 sufficient bonding to cover the contract amount for nondesign
7 services, and errors and omission insurance coverage sufficient to
8 cover all design, engineering, and architectural services provided
9 in the contract. This section does not prohibit a general or
10 engineering contractor from being designated the lead entity on a
11 design-build project for the purposes of purchasing necessary
12 bonding to cover the activities of the design-build entity.

13 (b) Any payment or performance bond written for the purposes
14 of this article shall be written using a bond form developed by the
15 Department of General Services under subdivision (i) of Section
16 14661 of the Government Code.

17 20209.30. All bids by subcontractors that were not listed by
18 the design-build entity in accordance with subparagraph (A) of
19 paragraph (1) of subdivision (c) of Section 20209.26 shall be
20 considered by the design-build entity in accordance with the
21 design-build process set forth by the transportation authority in the
22 design-build package. All bids by subcontractors bidding on
23 contracts under this article shall be subject to Chapter 4
24 (commencing with Section 4100) of Part 1 of Division 2. The
25 design-build entity shall do both of the following:

26 (a) Provide public notice of the availability of work to be
27 subcontracted in accordance with the publication requirements
28 applicable to the competitive bidding process of the transportation
29 authority.

30 (b) Provide a fixed date and time on which the subcontracted
31 work will be awarded in accordance with the procedure
32 established under this article.

33 20209.32. A deviation from the performance criteria and
34 standards established under subdivision (a) of Section 20209.26
35 may not be authorized except by written consent of the
36 transportation authority.

37 20209.36. The transportation authority may retain the
38 services of a design professional or construction project manager,
39 or both, throughout the course of the project in order to ensure
40 compliance with this article.



1 20209.38. Nothing in this article affects, expands, alters, or
2 limits any rights or remedies otherwise available at law.

3 20209.40. (a) Retention proceeds withheld by a
4 transportation authority from a design-build entity may not be
5 more than 5 percent of the total bid price if a performance and
6 payment bond, issued by an admitted surety insurer, is required in
7 the solicitation of bids.

8 (b) (1) Except as authorized under paragraph (2), in a contract
9 between the design-build entity and a subcontractor, and in a
10 contract between a subcontractor and any subcontractor
11 thereunder, the percentage of the retention proceeds withheld may
12 not exceed the percentage specified in the contract between the
13 transportation authority and the design-build entity.

14 (2) If the design-build entity provides written notice to any
15 subcontractor who is not a member of the design-build entity, prior
16 to or at the time the bid is requested, that a bond may be required,
17 and the subcontractor subsequently is unable or refuses to furnish
18 a bond to the design-build entity, the design-build entity may
19 withhold retention proceeds in an amount greater than authorized
20 under paragraph (1), from any payment made by the design-build
21 entity to the subcontractor.

22 20209.42. The transportation authority shall submit to the
23 Senate Committee on Transportation, and the Assembly
24 Committee on Transportation, on or before December 1, 2008, a
25 report containing a description of each public works project
26 procured through the design-build process, and completed on or
27 before November 1, 2008. The report shall include, but shall not
28 be limited to, all of the following information:

29 (a) A description of the project.

30 (b) The estimated and actual project costs.

31 (c) The design-build entity that was awarded the project.

32 (d) The estimated and actual length of time to complete the
33 project.

34 (e) A description of any written protests concerning any aspect
35 of the solicitation, bid, proposal, or award of the design-build
36 project, including, but not limited to, the resolution of the protests.

37 (f) An assessment of the prequalification process and criteria.

38 (g) An assessment of the impact of limiting retention to 5
39 percent on the project, as required under Section 20209.40.

1 (h) A description of the labor force compliance program
2 required under Section 20209.24, and an assessment of the impact
3 on a project where compliance with that program is required.

4 (i) A description of the method used to award the contract. If
5 best value was the method, the factors used to evaluate the bid shall
6 be described, including the weighting of each factor and an
7 assessment of the effectiveness of the methodology.

8 (j) An assessment of the project impact of “skilled labor force
9 availability” requirement imposed under clause (iv) of
10 subparagraph (A) of paragraph (2) of subdivision (d) of Section
11 20209.26.

12 (k) Recommendations regarding the most appropriate uses for
13 the design-build approach.

14 20209.44. This article shall remain in effect only until January
15 1, 2010, and as of that date is repealed, unless a later enacted statute
16 that is enacted before January 1, 2010, deletes or extends that date.

17 SEC. 2. The Legislature finds and declares that a special law
18 is necessary and a general law cannot be made applicable within
19 the meaning of Section 16 of Article IV of the California
20 Constitution because of the unique need of the County of Alameda
21 and the Santa Clara Valley Transportation Authority to be able to
22 utilize cost-effective options for the delivery of highway projects.

23 SEC. 3. No reimbursement is required by this act pursuant to
24 Section 6 of Article XIII B of the California Constitution because
25 the only costs that may be incurred by a local agency or school
26 district will be incurred because this act creates a new crime or
27 infraction, eliminates a crime or infraction, or changes the penalty
28 for a crime or infraction, within the meaning of Section 17556 of
29 the Government Code, or changes the definition of a crime within
30 the meaning of Section 6 of Article XIII B of the California
31 Constitution.

